Office-Supreme Court, U.
FILED
MAR 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 954

CBN CORPORATION (formerly COLUMBIAN CARBON COMPANY),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT J. CASEY,
Attorney for Petitioner,
120 Broadway,
New York, N. Y. 10005.

THOMAS E. TYRE,
CLARK, CARR & ELLIS,
120 Broadway,
New York, N. Y. 10005,
of Counsel.

INDEX

	PAGE
Statement	1
Reply	1
Conclusion	6

CITATIONS

Bankline Oil Co., Helvering v., 303 U.S. 362 (1938)	4
CBN Corp. v. *United States,* 328 F.2d 316 (Ct. Cls. 1964)	2n
CBN Corp. v. *United States,* 364 F.2d 393 (Ct. Cls. 1966)	2n
Food Machinery and Chemical Corp. v. *United States,* 348 F.2d 921 (Ct. Cls. 1965)	4
Food Machinery and Chemical Corp. v. *United States,* 366 F.2d 1007 (Ct. Cls. 1966)	4
Paragon Jewel Coal Co. v. *Commissioner,* 380 U.S. 624 (1965)	6
Southwest Exploration Co., Commissioner v., 350 U.S. 308 (1956)	2
Tidewater Oil Co. v. *United States,* 339 F.2d 633 (Ct. Cls. 1964)	3
GCM 22730, 1941-1 Cum. Bull. 214	2n

IN THE

Supreme Court of the United States

October Term, 1966

No. 954

CBN CORPORATION (formerly COLUMBIAN CARBON COMPANY),

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Statement

The petition for a writ of certiorari was filed and served on January 10, 1967. Respondent's Brief in Opposition was filed on March 9, 1967 and served on March 10, 1967.

Reply

In its Brief in Opposition to the Petition For a Writ of Certiorari to the United States Court of Claims in this case, Respondent, United States, has succinctly and clearly emphasized the basic error committed by the Court below which petitioner is requesting this honorable Court to redress.

A vital point involved is that in the first *CBN* case,[1] the Court below held that petitioner possessed a depletable economic interest in the subject mineral *because* it possessed a *royalty interest* therein. Respondent in its Brief admits this fact. See Respondent's Brief in Opposition, p. 10. In the instant case,[2] the same Court, without in any way disturbing its prior holding that petitioner had acquired a royalty interest [3] held, nevertheless, that petitioner does not have a depletable interest under the identical contract because it is, or was, not *essential to production* of the mineral.

Petitioner is contending before this Court, *inter alia,* that in establishing such a criterion for a depletable interest, the Court below has adopted a test that is entirely new, separate, and paramount and one which is erroneous as a matter of law, contrary to the decisions of this Court, the Court of Claims' own decisions, and all existing law. Petitioner contends that this has been accomplished by extracting a novel theory from limiting *language* used by this Court in *Commissioner* v. *Southwest Exploration Co.*, 350 U.S. 308 (1956).

In its Brief in Opposition, Respondent has clearly pointed out and, in fact, admitted the error complained of by agreeing that the *Southwest* case must be restricted in the scope of its application and by also agreeing that the "essential to production" criterion or doctrine is erroneous as a matter of law and unsupported by the cases relied upon by the Court below.

Thus, in its Brief respondent states, with reference to *Southwest,* that:

---

[1] *CBN Corp.* v. *United States,* 328 F.2d 316 (Ct. Cls. 1964).

[2] *CBN Corp.* v. *United States,* 364 F.2d 393 (Ct. Cls. 1966).

[3] An interest in minerals which has always been held to be a depletable one; see GCM 22730, 1941-1 Cum. Bull. 214, 218, 221.

> "Moreover, this narrow holding was prefaced by a warning that the Court was *not* promulgating any general principle which would extend the depletion allowance to taxpayers 'disassociated from the lease' *solely* because they contributed facilities or an investment which might in some sense be considered *essential* to production." (Respondent's Brief in Opposition, p. 11—emphasis supplied.)

This is exactly the point. The error committed by the Court below was that it adopted the language which this Court used in *Southwest* and fashioned it into a positive general requirement or test to which petitioner, and all other taxpayers, must conform in order to be *allowed* the depletion allowance. Thus, in the instant case, the Court below held that *despite its royalty interest* petitioner could *not* qualify for the allowance because it was *not* "essential to production." Now respondent before this Court *admits* that such a test is far beyond the scope of *Southwest* and contrary to the admonitions of this Court. Respondent points out (Brief, p. 12) that the Court below *correctly rejected* the "essential to production" doctrine in its decision in *Tidewater Oil Co.* v. *United States,* 339 F.2d 633 (Ct. Cls. 1964) and in this petitioner concurs. But *Tidewater* is the case cited by the Court below in the instant case as the decision which "changed the legal atmosphere," and enabled it to reverse its decision in first *CBN* and apply that same doctrine to petitioner herein. This is also an error which petitioner is asking this Court to correct.

Contrary to respondent's asertion, in deciding the first *CBN* case the Court below did not "misread" *Southwest* nor did it bottom its *first* decision on grounds that petitioner was "essential to production". (See Petition, Appendix C, p. 15c, footnote 5.) In first *CBN* it found that petitioner had acquired a royalty interest and the Court *rejected* respondent's argument, based on language in *Southwest,* that a taxpayer must also be "essential to production" in order to be deemed to have an economic interest, re-

gardless of the nature of its actual property interest in the mineral. See Respondent's Brief, p. 10. As pointed out above, the Court below again rejected a similar contention by respondent in *Tidewater*. Yet in the instant case it did a complete about-face and applied the "essential to production" doctrine to petitioner as the *requirement* for a depletable interest and cited *Tidewater* as the change in legal atmosphere which enabled it to raise the bar of collateral estoppel.

Petitioner agrees that the Court below did in fact change its mind and did indeed adopt the "essential to production" doctrine as the criterion for a depletable interest, but submits that it did so in the case of *Food Machinery and Chemical Corp.* v. *United States,* 348 F.2d 921 (Ct. Cls. 1965) and *not* in its decision in *Tidewater*. Petitioner also submits that the doctrine is erroneous and contrary to the decisions of this Court in *Southwest* and in *Bankline Oil Co.* v. *Helvering,* 303 U.S. 362 (1938). Respondent United States apparently agrees; yet it opposes review by this Court of a case which misconstrued and misapplied this Court's own language.

It is notable that in its Brief in Opposition respondent makes no mention of the decision of the Court below in the *Food Machinery* case. There for the first time in tax jurisprudence, the Court of Claims held that a taxpayer which it considered economically "essential to production," but which otherwise had none of the standard attributes of a depletable interest, was *entitled* to the depletion allowance because of its essentiality. Subsequently, the Court of Claims carried this doctrine to its ultimate absurdity by denying Simplot, the lease-owner-miner, the depletion allowance because in its opinion Food Machinery Corp. was the party "essential to production." *Food Machinery and Chemical Corp.* v. *United States,* 366 F.2d 1007 (Ct. Cls. 1966).

When the instant second *CBN* case came before it, however, the Court below, seeking to avoid *both* collateral estoppel *and* reconsideration of the merits in the light of its new doctrine, cited the *Tidewater* case as the vehicle which allegedly "changed the legal atmosphere" by giving birth to the essentiality doctrine. Thus, it enabled itself to hold that petitioner does not have a depletable interest (despite its royalty) because it is *not* "essential to production." The second *CBN* case was decided on the record made in the first *CBN* case which was concerned with the 1952 contract. No attempt was made by the Court below to ascertain whether or not petitioner *in fact* met the requirements of this new "essentiality" doctrine and petitioner's request for an opportunity to show that under the 1935 contract it fit squarely within the prerequisites thereof as promulgated in *Food Machinery* was denied.

The only conceivable reason that the Court below refused to afford petitioner the opportunity to prove that it met, or even surpassed, the new requirements for being "essential to production" as set out in *Food Machinery* is that the Court below recognized that if this essentiality were established the "rearrangement" theory of the 1952 contract adopted by the minority in the first *CBN* case and by the majority in second *CBN* would fall of its own weight and first *CBN* would stand despite the subsequent "change of mind" by the Court of Claims as to this particular taxpayer. To prevent this, the Court below in the instant second *CBN* case based its reconsideration "anew" on the assumption that petitioner did not possess an economic interest under the 1935 contract—an unlitigated assumption ascribed in first *CBN* long before the basically factual "essential to production" doctrine was conceived by the Court of Claims.

Petitioner submits that elementary justice requires that if a new criterion was to be applied to petitioner in litigating the same issue for the second time, at the very least it should have been given the opportunity to show that it

conforms to said new criterion and it should not have been foreclosed by a presumption derived from the old rules for determining the existence of a depletable interest. It should be noted that the Court of Claims was well aware of the fact that it was applying a new test in the instant case as it cited the *Food Machinery* case as an example of what facts it *now* deems pertinent in order to meet its "essential to production" rule. See Petition, Appendix A, page 8a, footnote 3. In effect, then, the Court below has decided the issue without giving petitioner an opportunity to be heard.

Now, after petitioner has been turned to and fro by the efforts of the respondent to establish in the Court of Claims the doctrine of "essentiality," the epitome of irony is reached in this Court when respondent contends that the entire doctrine of "essential to production" is erroneous and contrary to the decisions of this Court in *Southwest* and *Paragon Jewel Coal Co.* v. *Commissioner,* 380 U.S. 624 (1965). If this error had been pointed out to the Court below instead of *contended for* in that forum, petitioner would not now be before this Court seeking relief.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. CASEY,
Attorney for Petitioner.

THOMAS E. TYRE,
CLARK, CARR & ELLIS,
120 Broadway,
New York, N. Y. 10005,
Of Counsel.